Supreme Court of the United States

OCTOBER TERM 1951—No. 522

JOSEPH BURSTYN, INC.,

Appellant,

—against—

LEWIS A. WILSON, Commissioner of Education of the State of New York, *et al.*,

Appellees.

BRIEF OF NEW YORK STATE CATHOLIC WELFARE COMMITTEE, *AMICUS CURIAE*

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The New York State Catholic Welfare Committee represents the seven Catholic dioceses of the State of New York, in which there are over four million Catholics. The parties to this appeal have consented to the filing of this brief. By leave of the Appellate Division and of the Court of Appeals, this Committee filed briefs in both those Courts in support of the Appellees' position.

The Prior Proceedings

When "The Miracle" was publicly shown in New York City in December 1950, the License Commissioner of the City held that the picture was blasphemous and threatened to revoke the license of the Paris theater, where it was showing. The licensee Joseph Burstyn, Inc. sued to enjoin cancellation of the theater license. The court granted an injunction, and held that the City License Commissioner was without power to act, saying:

> "The right to determine whether a motion picture is indecent, immoral or sacrilegious is vested solely and exclusively in the education department of the

state." (*Burstyn v. McCaffrey*; Steuer, J., Special Term, Part III, New York County, N. Y. Law Journal, Jan. 8, 1951, p. 77, col. 1.)

The court further pointed out that the Legislature had recently forbidden criminal prosecution of any licensed motion picture (L. 1950, ch. 624). The court then sharply pointed to the only remedy of any or all of the citizens of the state where a license has been issued erroneously:

> "* * * any individual can seek to have the Board* of Regents revoke its permit or if he can show that the license was granted through an abuse of power he will find the court just as ready to relieve against such an abuse as it is to restrain this one."

Before the Regents

In reliance on this decision, pointing to the appropriate remedy, and in view of continued public protests, the Regents on their own motion appointed a committee of three of their members to view the picture and report. The committee reported (R. 49):

> "Soon after the showing of this picture at the Paris Theatre in New York City, the Education Department was fairly flooded with protests against its public exhibition."

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* The Board of Regents of the University of the State of New York, which has had continuous existence since 1784, is the head of the State Department of Education (New York Constitution, Art. 5, Sec. 4; *cf.* Art. 11, Sec. 2).

The licensing of motion pictures in New York was originally required by Laws of 1921, Ch. 715, sustained as constitutional in *Pathe Exchange, Inc.* v. *Cobb*, 202 App. Div. 450 (3rd Dept. 1922), aff'd 236 N. Y. 539 (1923). The original statute created a licensing body called "The Motion Picture Commission." This Commission was abolished in 1926, and its functions were transferred to the Education Department under the control of the Regents (L. 1926, Ch. 544; L. 1927, Ch. 153, § 29; *cf.* N. Y. Education Law, §§ 120-132).

The committee went on to report that having viewed the picture "in their opinion there was basis for the claim that the picture was sacrilegious".* The Regents then ordered a hearing in New York City at which the licensees were directed to show cause why the licenses should not be rescinded and cancelled (R. 27).

At the hearing before the committee of the Regents on January 30, 1951, the appellant, Joseph Burstyn, Inc., appeared specially by counsel, challenged the jurisdiction of the Board of Regents and of the committee on the ground of bias and lack of power or authority to proceed, and without attempting to meet the merits of the controversy, withdrew from further participation in the hearing. Joseph Burstyn, who is the sole stockholder of the appellant, individually appeared by counsel and submitted an affidavit and numerous exhibits. Opponents of the film were limited to the submission of briefs. The committee of the Regents reported in favor of the jurisdiction and authority of the Regents and recommended that the Regents, as a Committee of the Whole, view the motion picture in question.

The Board of Regents, at their meeting in Albany on February 16, 1951, received the report of their committee, and having themselves viewed the picture, unanimously found it to be sacrilegious and cancelled and rescinded the licenses previously issued.

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* New York Education Law, § 122, provides that a license shall be issued for any motion picture film

"unless such film or a part thereof is obscene, indecent, immoral, inhuman, *sacrilegious*, or is of such a character that its exhibition would tend to corrupt morals or incite to crime."

Before the New York State Courts

The appellant thereupon brought a proceeding in the nature of mandamus under Article 78 of the New York Civil Practice Act against the Regents, to compel the restoration of the licenses. Pursuant to statute, this petition came on for hearing in the first instance before the Appellate Division, Third Department. The Justices of the Appellate Division viewed the picture. On May 9, 1951, they unanimously sustained the action of the Regents (R. 87, 88; 278 App. Div. 253). The appellant then appealed to the Court of Appeals. The Judges of that Court also viewed the picture. By a vote of 5 to 2 they affirmed the order of the Appellate Division (R. 144-172; 303 N. Y. 242).

The Facts

The majority opinion in the Court of Appeals accepted the definition of "sacrilegious" given in Funk & Wagnalls' New Standard Dictionary (1937 edition) as "The act of violating or profaning anything sacred" and held the words "sacrilegious" and "profane" to be synonymous (303 N. Y. at p. 255). The concurring opinion of Judge Desmond said (303 N. Y. at p. 263):

> "Of course, some of the meanings of 'sacrilegious' have no possible application to a motion picture, but, according to all the dictionaries and common English usage, the adjective has one applicable meaning, since it includes violating or profaning anything held sacred (see Oxford Dictionary, Vol. 8, pp. 18-19; Webster's New International Dictionary [2d ed.], unabridged, p. 2195; Black's Law Dictionary [deluxe ed.], p. 1574.)"

These definitions indicate that the license shall not be issued if the film profanes sacred things.

Million of citizens of the State of New York—Catholic and non-Catholic alike—believe and revere as sacred truths related in the Holy Gospels that Jesus Christ is the Son of God, born of the Virgin Mary, who is referred to as the Blessed Virgin; that she was married to St. Joseph; that she conceived Jesus through the direct intervention of God, the Holy Ghost, and that she remained, before and after conception, a Virgin.

We quote from the Bible (Gospel according to St. Matthew, Chapter I, Verses 18-25):

Protestant (King James Version)	*Catholic* (Douay Version)
18. Now the birth of Jesus Christ was on this wise: When as his mother Mary was espoused to Joseph, before they came together, she was found with child of the Holy Ghost.	18. Now the generation of Christ was in this wise. When as his mother Mary was espoused to Joseph, before they came together, she was found with child, of the Holy Ghost.
19. Then Joseph her husband, being a just man, and not willing to make her a publick example, was minded to put her away privily.	19. Whereupon Joseph her husband, being a just man, and not willing publicly to expose her, was minded to put her away privately.
20. But while he thought on these things, behold, the angel of the Lord appeared unto him in a dream, saying, Joseph, thou son of David, fear not to take unto thee Mary thy wife: for that which is conceived in her is of the Holy Ghost.	20. But while he thought on these things, behold the Angel of the Lord appeared to him in his sleep, saying: Joseph, son of David, fear not to take unto thee Mary thy wife, for that which is conceived in her, is of the Holy Ghost.

Protestant (King James Version)	*Catholic* (Douay Version)
21. And she shall bring forth a son, and thou shalt call his name JESUS: for he shall save his people from their sins.	21. And she shall bring forth a son: and thou shalt call his name Jesus. For he shall save his people from their sins.
22. Now all this was done, that it might be fulfilled which was spoken of the Lord by the prophet, saying,	22. Now all this was done that it might be fulfilled which the Lord spoke by the prophet, saying:
23. Behold, a virgin shall be with child, and shall bring forth a son, and they shall call his name Emanuel, which being interpreted is, God with us.	23. Behold a virgin shall be with child, and bring forth a son, and they shall call his name Emmanuel, which being interpreted is, God with us.
24. Then Joseph being raised from sleep did as the angel of the Lord had bidden him, and took unto him his wife:	24. And Joseph arising up from sleep, did as the angel of the Lord had commanded him, and took unto him his wife.
25. And knew her not till she had brought forth her firstborn son: and he called his name JESUS.	25. And he knew her not till she brought forth her firstborn son: and he called his name JESUS.

See also St. Luke, ch. I, verses 26-38.

"The Miracle" tells the story of a demented peasant girl who meets a bearded stranger who she thinks is St. Joseph. This stranger first makes her drunk and then seduces her. The seduction scene leads up to a blackout in the film, during which actual sexual intercourse and conception are supposed to occur.

To make the point abundantly clear, this seduction scene is accompanied by both a voice and English sub-titles which make shocking reference to the above quoted Biblical passages on the conception of Jesus Christ. We quote from the "voice" in the film-script (R. 67), which is repeated in the English sub-titles on the screen (R. 83):

> "* * * An angel of the Lord appeared to him in a dream and said . . . Joseph, son of David, have no fear to take Mary as your bride . . . for what is being conceived in here * * *"

Then follows the blackout. Because of her drunken condition she believes conception was accomplished miraculously and without carnal relations. Her belief is told to fellow townspeople who stage a mock religious procession in her honor. The girl is dressed in clothes caricaturing those worn in church processions honoring the Virgin Mary, and an old wash basin is placed on her head to resemble a crown. Flowers are strewn in her path, while the people sing a well-known hymn ("Evviva Maria") in honor of Mary and the Deity (R. 76). The child she is carrying is addressed by the girl as "Blessed Son" and "My God" (R. 76). The film concludes with a realistic portrayal of her labor pains, and the birth of her child in the precincts of a church.

"The Miracle" thus presents a brutal mockery of what Catholics and Protestants alike revere as a most sacred event, the conception and birth of Jesus Christ.

The Appellant's Statement of Facts is Incomplete in Important Particulars

In the light of the facts as found by the Regents and by both Courts below, there seems no justification for the manifestly incomplete description of the picture at pages 3 and 4 of Appellant's brief. The Special Committee of Regents, the Regents, the Appellate Division and the Court of Appeals all viewed the film in question and all made substantially the same findings. The appellant seems not to appreciate that these findings are binding on it at this stage of the appeal. The Court of Appeals stated the facts clearly (R. 152):

> "We have all viewed the film in question. The so-called exhibits, which are simply unsworn communications expressing personal opinions, are of little help to us. The principal basis for the charge of sacrilege is found in the picture itself, the personalities involved, the use of scriptural passages as a background for the portrayal of the characters, and their actions, together with other portions of the script and the title of the film itself. It is featured as a 'way of love'. At the very outset, we are given this definition: 'ardent affection, passionate attachment, men's adoration of God, sexual passion, gratification, devotion'.
>
> While the film in question is called 'The Miracle', no miracle is shown; on the contrary, we have the picture of a demented peasant girl meeting a complete stranger whom she addresses as 'Saint Joseph'. At the very beginning of the script, reference is made to 'Jesus, Joseph, Mary'. 'Saint Joseph' first causes her to become intoxicated. Scriptural passages referring to the Holy Sacrament (Luke 22:19), and to the nativity of Christ (Matthew 1:20), are freely employed imme-

diately after she states she is not well. A blackout in the film, in its association with the story, compels the inference that sexual intercourse and conception ensue. 'Saint Joseph' abandons her immediately following the seduction, she is later found pregnant, and a mock religious procession is staged in her honor; she is 'crowned' with an old washbasin, is thrown out by her former lover, and the picture concludes with a realistic portrayal of her labor pains and the birth in a church courtyard of her child, whom she addresses as 'my blessed son, My holy son'.

Christ is the heart and core of the Christian faith. Two personalities most closely related to Him in life were His mother, Mary, and Joseph. They are deeply revered by all Christians. Countless millions over the centuries have regarded their relationship as sacred, and so do millions living to day. 'The Miracle' not only encroaches upon this sacred relationship and the Biblical presentation thereof in respect to the birth of Christ, but utterly destroys it, associating it, as the Regents found, 'with drunkenness, seduction, mockery and lewdness', and, in the language of the script itself, with 'passionate attachment * * * sexual passion' and 'gratification', as a way of love."

The showing of this film "provoked an immediate and substantial public controversy; and the Education Department was fairly flooded with protests against its exhibition" (R. 145; *cf.* R. 49). None of these communications of disapproval are in the transcript of record before this Court. We regard this omission as proper. Material of this nature would not be admissible in a trial court of first instance. Much less do they have pertinency on this appeal. Not-

withstanding this the appellant has printed a large number of excerpts from comments favorable to the film.

These, of course, are *ex parte* unsworn communications. It seems probable from the number of names affixed to some of them that signatures were solicited in the fashion of nominating petitions. The Court of Appeals properly referred to them as "so-called exhibits", and found that they were "of little help", (R. 152).

This practice seems a distortion of the use of expert testimony. We doubt that this Court will find these communications any more "helpful" or relevant than did the Court of Appeals.

Summary of Argument

Three questions of law, we submit, are involved on the present appeal. They are these:

1. Is it an unconstitutional violation of freedom of speech for any State to provide for any type of inspection and prior licensing of motion picture films exhibited for profit? Appellant insists that all such systems are of necessity unconstitutional, and that no State may, by a licensing system, forbid the showing of any film, no matter how obscene, immoral or otherwise objectionable. We submit that there is nothing in the Constitution of the United States which requires any such result.

2. Is it an unconstitutional "establishment of religion" to deny a license for the public showing for profit of a film which associates the most sacred beliefs of millions of citizens with "drunkenness, seduction, mockery and lewdness"? We submit that it is not.

3. Is the appellant, by having submitted voluntarily to the licensing requirements of the statute, and by bringing the present proceeding to compel the restoration of the license originally issued, estopped to attack the constitutionality of the statute the protection of which it seeks to invoke? We submit that appellant is thus estopped.

POINT I

The New York statute is not a law abridging freedom of speech or of the press.

The very statute here under attack specifically provides (N. Y. Education Law, § 123) for exemption from prior licensing and censorship of motion pictures whose natural object is the dissemination of ideas,—i.e. films of current events, of scientific and educational character, and for religious, charitable and educational purposes. (*cf.* Opinion below, 303 N. Y. at p. 258)

The picture here in question, however, was obviously designed not for the dissemination of ideas and presentation of serious argument (as indeed appellant admits here) but for entertainment in a place of amusement for profit. It was precisely because of appellant's own recognition of this obvious fact that the film was submitted for prior review and licensing as a commercial spectacle under Section 122 of the New York Education Law and that no attempt was made to obtain, under Section 123, a simple permit (issued without prior examination) for its exhibition as a scientific, religious or educational film.

Whatever may be argued pro or con as to a claim of unrestrained right to exhibit "documentary" films, that question has no bearing on this appeal. The propriety of re-

straints in respect of entertainment spectacles in public places of amusement for private gain is not novel either in the Courts of New York or in this Court.

The original statute in New York, from which the statute here in question was derived almost *in haec verba*, was unanimously sustained in *Pathe Exchange* v. *Cobb*, 202 App. Div. 450, affd. 236 N. Y. 539.

In reaching their decision in that case the New York Courts relied upon the unanimous decision of this Court in *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230 (1914).

Appellant now argues that the *Mutual Film Corporation* case is no longer law. Indeed appellant goes so far as to assert that any and all requirements for the licensing of talking motion pictures are now unconstitutional.

But as recently as 1938, this Court unanimously gave judgment *per curiam* on the authority of the *Mutual Film Corporation* case in *Eureka Productions, Inc.* v. *Lehman*, 304 U. S. 541.

And in 1949 in *Kovacs* v. *Cooper*, 336 U. S. 77 (repeatedly cited with approval in Appellant's Brief), Mr. Justice Frankfurter in his concurring opinion at page 96 said:

> "Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated. *Mutual Film Corporation* v. *Industrial Commission*, 236 U. S. 230."

And in the color television case (*Radio Corporation of America* v. *United States*, 341 U. S. 412, 1951), Mr. Justice Frankfurter in his separate opinion said (341 U. S. 425-6):

> "Man forgets at terrible cost that the environment in which an event is placed may powerfully determine

its effect. Disclosure conveyed by the limitations and power of the camera does not convey the same things to the mind as disclosure made by the limitations and power of pen or voice. The range of presentation, the opportunities for distortion, the impact on reason, the effect on the looker-on as against the reader-hearer, vary; and the difference may be vital. Judgment may be confused instead of enlightened. Feeling may be agitated, not guided; reason deflected, not enlisted. Reason—the deliberative process—has its own requirements, met by one method and frustrated by another."

In fact in 1950 a motion picture producer attempted to argue, as Appellant now does, that the *Mutual Film* case is no longer law and that film licensing is unconstitutional. The attempt was unsuccessful. *RD-DR Corporation* v. *Smith*, 183 F. 2nd 562 (C. A. 5th), cert. den. 340 U. S. 853.

We must bear in mind that, as stated by this Court in *Kovacs* v. *Cooper*, 336 U. S. 77, 85: "even the fundamental rights of the Bill of Rights are not absolute".

Wholly apart from motion pictures and in the realm of the individual living voice, this Court has been careful when striking down restrictive statutes to point out that the states are not powerless to protect the public peace and order from highly inflammatory and provocative speech without waiting for the probable breach of the peace to occur. In spite of this, Appellant attempts to read into this Court's decision in *Kunz* v. *New York*, 340 U. S. 290, a holding that anyone may with impunity flagrantly deride the religious beliefs of others,—even in a spectacle exhibited purely for commercial gain. Similarly in other cases cited, Appellant lifts the occurrence out of context and fails

to observe that the decisions related to statutes which the Court found to be lacking in standards appropriately connected with the protection of public peace and order.

The statute here, however, requires no such speculation as this Court found objectionable in the ordinance involved in the *Kunz* case. By the time a motion picture has been produced the words have been spoken, the gestures made, the expression completed. There is no need for speculation as to what they are or will be. Both can be determined by simple observation of what they have been. If what has been done may be punished as an abuse of constitutional right, can it be said that its repetition again and again may not be constitutionally restrained?

As the law of New York now stands, the exhibitor of a film which has received a license is *ipso facto* exempted from prosecution for showing it, as was pointed out by the court in the prior proceeding involving this same film (*Burstyn* v. *McCaffery*, cited *supra*, p. 2). It was presumably with this factor in mind that appellant obtained a license in the first instance and later brought the present proceeding to compel that license to be restored. Indeed, we may question whether appellant, in the absence of any licensing requirements, would not strenuously contend that the exhibition of this particular film is protected against prosecution by the same constitutional guaranties which it now invokes. But even if this were not so, the logic of appellant's position would leave the community powerless to prevent repeated exhibitions of a film advocating overthrow of the government by force and calculated to incite to riot, or repeated exhibitions of a film unquestionably obscene, although each new fanatic exhibitor could be prosecuted. We submit there is nothing in the Constitution to compel any such result.

POINT II

The statute is neither vague nor indefinite, nor is it a law respecting the establishment of religion.

Section 122 of the New York Education Law forbids the issuance of a license for the exhibition for profit of a film which is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such character that its exhibition would tend to corrupt morals or incite to crime".

The Regents are peremptorily required by the same statute to grant a license to every film which does not fall within one or more of the categories named.

On this branch of the argument, appellant asserts that it is constitutionally improper in any event to include "sacrilegous" among the proscribed categories, *first* because the word is said to be fatally indefinite, and *second* because its application is said to require the formulation of a religious judgment and therefore constitutes an establishment of religion.

The individual categories prohibited have been quite properly construed by the New York courts in the light of the general definitive phrases associated with them. These clearly disclose that the object and intent of the statute is the protection of the public welfare and not, in any sense, the establishment either of a particular religion or of religion generally. By the inclusion of "sacrilegious" among the categories considered likely to offend against public decency and order, the statute simply expresses the awareness by the Legislature of the fact of historical human experience, often noted by this Court, that religious beliefs are held not simply as a matter of cold intellectual

judgment, but as well, by many adherents, with an emotional intensity which can, and in the past often has, led to violent action in their defense.

On the question as to the alleged indefiniteness of the term "sacrilegious", after quoting dictionary definitions, the Court of Appeals said (303 N. Y. at pp. 255-6):

> "There is no difficulty in recognizing the limits of the criterion thus established, and the courts have had no problem either with the word 'sacrilegious' or with its synonym, 'profane'.
>
> In *Mutual Film Corp.* v. *Hodges*, (236 U. S. 248, *supra*), the contention that there was an invalid delegation of legislative power was rejected where the statute provided that the censor should approve such films as were found to be 'moral and proper and disapprove such as are *sacrilegious*, obscene, indecent or immoral, or such as tend to corrupt the morals' (p. 257, emphasis supplied). In *Winters* v. *New York* (333 U. S. 507, 510) it is stated that publications are 'subject to control if they are lewd, indecent, obscene or *profane*' (emphasis supplied). In *Chaplinsky* v. *New Hampshire* (315 U. S. 568, 571-572) Mr. Justice Murphy declared for a unanimous court: 'There are certain well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the *profane*' (emphasis supplied). Indeed, Congress itself has found in the word 'profane' a useful standard for both administrative and criminal sanctions against those uttering profane language or meaning by means of radio (*Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 156, certiorari denied 340 U. S. 929; U. S. Code, tit. 18, § 1464; see, also, Penal Law, § 2072)."

Or as Judge Desmond said in his concurring opinion (303 N. Y. at p. 263):

> "'Sacrilegious', like 'obscene' (see *Winters* v. *New York*, 333 U. S. 507), is sufficiently definite in meaning to set an enforcible standard. That men differ as to what is 'sacrilegious' is beside the point—there is nothing in the world which all men everywhere agree is 'obscene', yet obscenity laws are universally enforced."

Appellant, however, insists further that the administration of the statute requires the formulation by the Regents of a religious judgment and that this converts it into a "law respecting an establishment of religion." The Court of Appeals disposed of this argument in these words (303 N. Y. at p. 258):

> "Nor is it true that the Regents must form religious judgments in order to find that a film is sacrilegious. As hereinbefore indicated, there is nothing mysterious about the standard to be applied. It is simply this: That no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule to the extent that it has been here, by those engaged in selling entertainment by way of motion pictures. As the court below said of the statute in question, 'All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom' (278 App. Div. 253, 258.)"

This conclusion, we submit, was entirely sound. The Regents were not required by the law to usurp the function of religious authority by rendering a religious judgment

as to what is or is not, theologically speaking, "sacrilegious". The only judgment necessary was a judgment of the fact that reasonable persons within the State of New York believe a given proposition to be true and hold that belief as a matter of religious conviction. This is not a judgment on matters of theology. It is a judgment of an ascertainable fact in the life of the community.

Moreover it is a judgment of the type that this Court is frequently called upon to make in order to enforce the constitutional ban on laws prohibiting the free exercise of religion, *e.g.*, a judgment that a group of citizens are banded together in a common religion which holds as one of its tenets that a salute to the flag is an act of religious idolatry. *Barnette* v. *Board of Education*, 319 U. S. 624, 629.

Another branch of appellant's argument under this point may be summarized as follows:

> Every law which "aids all religions" is a law respecting an establishment of religion.
>
> The statute in question "aids all religions".
>
> Therefore it is unconstitutional.

The defect in this argument lies in exaggeration beyond plain intent and subsequent application of the words of Mr. Justice Black quoted at page 41 of Appellant's Brief:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

The very case in which the words were first used (*Everson* v. *Board of Education*, 330 U. S. 1, 15, 17) limited their application and refused to apply them to a statute

which indirectly afforded aid to all religions. The ban on laws which "aid all religions" can be constitutionally supported only where the aid is direct and imposes a real and appreciable burden upon the citizen. Attempts to lift these words from context and apply them *simpliciter* can only plague this Court with an endless series of controversies. For, if the words are to be so applied (and we think they are not), then by them the religious freedom clause of the First Amendment has been set at irreconcilable war with itself. That clause, by placing the power and authority of the nation behind the guaranty of free exercise of religion, itself most cogently "aids all religions".

At page 31 of its brief appellant quotes this question from the dissenting opinion below:

> "* * * At what point, * * * (does) a questioning of particular religious dogma take on the aspect of 'sacrilege'?"

To this we answer—At no point. We would zealously guard the constitutional right of anyone in this country, without interference from the civil authority, to "question" a dogma of any religious faith, including our own. Nor is that right in any way involved or challenged here.

In the present case there is no warrant for appellant's assertion (Br. p. 42) that the effect of the action of the Regents was "to impose the religious views of a minority upon all the citizens of the state". Neither the Regents nor the New York Courts have attempted to decree that anyone must accept or subscribe to any religious views concerning the Nativity of Christ. They have simply enforced a moderate statutory limitation on the means by which a caricature of those views may be expressed in an entertainment spectacle exhibited for profit in a public place of amusement.

The action, we submit, was neither a definition, an endorsement nor an imposition of any particular belief, or of any belief, respecting the Birth of Christ. It was far less significant than the long established recognition by Congress and state legislatures of Christmas as a legal holiday in every state, territory and possession of the United States. Yet we do not suppose that anyone would attempt to destroy the statutes by which this recognition is granted upon the claim that they constitute a religious judgment by the civil authority, or that they impose on citizens religious beliefs concerning the event recalled by the celebration of that day.

POINT III

The statute is not a law prohibiting the free exercise of religion.

Just what religious motives appellant had in exhibiting for profit at the Paris Theatre, in the height of the Christmas season, a foul travesty of Christ's Nativity, is something which appellant does not venture to explain. In any event, the argument that a sacrilegious film occupies a specially privileged constitutional position, and that any interference with its exhibition is a restraint of religious freedom, is wholly without merit. Indeed, we may properly inquire how far appellant and those who support it are prepared to push that argument. We assume that even appellant may concede that an indecent film can be barred from public showing for profit. We assume that there would have been at least a reasonable basis for barring as indecent this particular portrayal of the seduction of a drunken halfwit. But if appellant's argument be correct, all that is necessary to secure full constitutional protection is to do what was done here—namely, to give the charac-

ters a pseudo-Biblical background and to enact the seduction to the accompaniment of a reading from St. Matthew's Gospel. The matter then becomes, on appellant's contention, a case of religious freedom with which no one can interfere.

We submit, on the contrary, that the constitutional guarantee of freedom of religion is designed at least as much to protect the overwhelming mass of sincere religious believers of all denominations as it is to protect the "rights" of a producer who wishes to make a profit from a commercial exhibition which obscenely parodies their most cherished beliefs. In forbidding the exhibition for profit of sacrilegious films, the Legislature was merely expressing in concrete form its constitutional right and duty to preserve public decency and to protect the interests of all the people of this State.

When confronted with a similar claim that the constitutional freedom of religion protected a speaker against prosecution for having delivered an indecent attack upon the very same religious beliefs which are parodied in "The Miracle", the Supreme Court of Maine said in *State* v. *Mockus*, 120 Me. 84, 94, 113 Atl. 39, 43, 14 A. L. R. 871, 876 (1921):

> "Even as we are writing these words the man who is about to assume the duties of the high and responsible station of President of these United States, following the unbroken custom of more than a century, and to the end that his official vow may be more impressive and binding, reverently says, 'So help me God,' and then pausing, with equal reverence, salutes the Holy Scripture by a kiss. Congress and state Legislatures open their sessions with prayer addressed to the God of the Christian religion. Judicial tribunals, anxious to discover and apply the truth, the whole truth, and

nothing but the truth require those who are to give testimony in courts of justice to be sworn by an oath which recognizes Deity. Thus it will be seen that there is acknowledgment of God in each co-ordinate branch of government. Lest any argument in support of the recognition of God in the fundamental law of our state should be overlooked we point to the very preamble of our Constitution.

> 'We, the people of Maine, in order to establish justice, insure tranquility, provide for our mutual defense, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity so favorable to the design; and imploring His aid and direction in its accomplishment do ordain and establish the following Constitution.'"

And in the case at bar the Court of Appeals said (303 N. Y. at p. 259):

> "To say that government may not intervene to protect religious beliefs from purely private or commercial attacks or persecution, whatever the underlying motive, and however skillfully accomplished, as distinguished from the assertion of conflicting beliefs, is to deny not only its power to keep the peace, but also the very right to 'the free exercise' of religion, guaranteed by the First Amendment. The offering of public gratuitous insult to recognized religious beliefs by means of commercial motion pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to wor-

ship and believe as they choose. Insult, mockery, contempt and ridicule can be a deadly form of persecution—often far more so than more direct forms of action. The prohibition of such conduct comes within the legitimate sphere of State action, and this State has recognized this principle, not only in the Education Law but in other respects as well (see, e.g., Penal Law, art. 186; Civil Rights Law, art. 4). We are not aware that this power has ever been even impliedly denied to the States.

"This nation is a land of religious freedom; it would be strange indeed if our Constitution, intended to protect that freedom, were construed as an instrument to uphold those who publicly and sacrilegiously ridicule and lampoon the most sacred beliefs of any religious denomination to provide amusement and for commercial gain."

Cantwell v. *Connecticut*, 310 U. S. 296 (1940), cited by appellant, is no authority for the proposition that the exhibition for profit of an indecent and sacrilegious film is peculiarly protected by the Constitution of the United States. In that case the defendant Cantwell, in the course of what he conceived to be his religious duties as a Jehovah's Witnesses, solicited religious contributions without obtaining the permit required by state statute and played a phonograph record which attacked the religious beliefs of others. On the charge of soliciting funds for religious purposes without a permit, this Court properly held that the statute was unconstitutional. On the charge that the playing of the phonograph record constituted a common-law breach of the peace, this Court held that no such breach was shown.

This Court itself thus explained the Cantwell decision in *Cox* v. *New Hampshire*, 312 U. S. 569, 578 (1941):

> "In *Cantwell* v. *Connecticut, supra* (p. 305) the statute dealt with the solicitation of funds for religious causes and authorized an official to determine whether the cause was a religious one and to refuse a permit if he determined it was not, thus establishing a censorship of religion."

There has been no such censorship here. No one has been compelled by the action of the Regents or of the New York courts to believe or to disbelieve in anything. No one has been debarred by their action from expressing his beliefs or disbeliefs. The only thing they have done has been to apply the plain mandate of the statute to prevent the showing for profit in a public theatre of a film whose basic theme is an indecent parody of the religious convictions of millions of citizens of different faiths.

Such was the position taken by the Appellate Division when it said:

> "A view of the picture in question would convince any reasonable mind that it was conceived and produced purely as an entertainment spectacle, and not as a vehicle for inquiry or discussion as to the merits of any religious dogma. The statute does not muzzle either free speech or a free press. All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom. It should be added in connection with this point that news films, scientific and educational films, are expressly exempt from censorship (Education Law, Section 123)."

The Court of Appeals has sustained this construction of the whole statute. Judge Froessel stated plainly:

"Religious presentations, as ordinarily understood, as well as other educational and scientific films, are exempt (Education Law, § 123). Thus freedom of religion is not impaired in the slightest, as anyone may express any religious or antireligious sentiment he chooses through a proper use of the films" (303 N. Y. at p. 258).

* * * * *

"There is here no regulation of religion, nor restriction thereof or other interference with religious beliefs except insofar as the picture itself does so, nor is there any establishment of religion or preference of religion or use of State property or funds in aid of religion. There is nothing more than a denial of the claimed right to hurl insults at the deepest and sincerest religious beliefs of others through the medium of a commercial entertainment spectacle" (303 N. Y. at p. 259).

Unlike the situation in *Kunz* v. *New York*, 340 U. S. 290, we have here a statute establishing "fair standards in safeguarding peace" in the State. The words of Mr. Justice Frankfurter relating to that case are thus particularly pertinent here:

"In the present case, Kunz was not arrested for what he said on the night of arrest, nor because at that time he was disturbing the peace or interfering with traffic. He was arrested because he spoke without a license, and the license was refused because the police commissioner thought it likely on the basis of past performance that Kunz would outrage the religious sensibilities of others. If such had been the supportable finding on the basis of fair standards in safeguarding peace in one of the most populous cen-

> ters of New York City, this Court would not be justified in upsetting it. It would not be censorship in advance. But here the standards are defined neither by language nor by settled construction to preclude discriminatory or arbitrary action by officials. The ordinance, as judicially construed, provides that anyone who, in the judgment of the licensing officials, would 'ridicule' or 'denounce' religion creates such a danger of public disturbance that he cannot speak in any park or street in the City of New York. Such a standard, considering the informal procedure under which it is applied, too readily permits censorship of religion by the licensing authorities. *Cantwell* v. *Connecticut*, 310 U. S. 296. The situation here disclosed is not, to reiterate, beyond control on the basis of regulation appropriately directed to the evil" (*Niemotko* v. *Maryland*, 340 U. S. 268 at pp. 285-6).

In the instant case the standard, as the courts below have held, is readily understandable and sufficiently definite. Its application involves none of the elements of speculation, since it is to be applied on the basis of examination of the fixed medium to which it applies,—*i.e.* the motion picture film and accompanying sound track actually proposed to be exhibited. Nor is the procedure characterized by the informality present in the *Kunz* case, since the hearing is before an established body operating under a fixed statute, which provides full opportunity for both administrative and judicial review (cf. N. Y. Education Law, §124). The statute properly and correctly relates to preservation of the public peace, and in no way abridges the free exercise of religion or the expression of religious belief or disbelief.

POINT IV

In any event appellant is estopped to attack the constitutionality of the statute.

In *Fahey* v. *Mallonee*, 332 U. S. 245, 255 (1947), this Court said:

> "It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.' *United States* v. *San Francisco*, 310 U. S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348, 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.'"

That principle is directly applicable here. Appellant originally submitted without question to the licensing requirements of the statute and applied for, and obtained, a license from the Motion Picture Division. Not only that, but appellant now insists—as it did in its previous action for injunction before Mr. Justice Steuer (*Burstyn* v. *McCaffrey, supra*) that that license was lawfully issued and that appellant is entitled to protection under it, no matter what the Regents or aynone else might do. In its brief in the Appellate Division (pp. 48-9) appellant insisted that the Court should now "order the restoration to the petitioner of said license".

The restoration of the license which petitioner seeks in the judicial proceeding now under review would automatically give appellant the right to exhibit this film in perpetuity in the State of New York, and would automatically exempt appellant from any criminal proceedings, since the

New York Legislature has provided (L. 1950, Ch. 624) that there can be no criminal prosecution for the exhibition of a licensed motion picture.

All other considerations apart, appellant has plainly estopped itself from asserting that the licensing statute, the protection of which it seeks, is unconstitutional and that there is no lawful authority anywhere in the State of New York or in the United States which can require a license for this picture. Appellant cannot attack the constitutionality of a statute the benefits of which it originally sought, and indeed still seeks, to obtain. This indeed was the view of the Court of Appeals, which said (303 N. Y. at p. 269):

> "Petitioner finally argues that the statute is unconstitutional *in toto*; that motion pictures are to be treated as the press generally, and may not be subjected to censorship or prior restraint. *While it may not be heard in this respect, inasmuch as it has sought and obtained benefits under the statute, and even now seeks to retain the licenses granted* (*Fahey* v. *Mallonee*, 332 U. S. 245, 255; *Shepherd* v. *Mount Vernon Trust Co.*, 269 N. Y. 234, 244-247), we shall dispose of this argument upon the merits." (Italics ours.)

CONCLUSION

The order appeal from should be affirmed.

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Respectfully submitted,

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